

**EXHIBIT 1**  
**part 2 of 5**

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10 SUPERIOR COURT OF CALIFORNIA  
11 COUNTY OF MONTEREY  
12 SALINAS DIVISION

14 In re

15 FRED L. BAKER,

16 Petitioner,

17 On Habeas Corpus.

NO. HC 04990

RETURN TO THE ORDER TO  
SHOW CAUSE; SUPPORTING  
MEMORANDUM OF POINTS AND  
AUTHORITIES

19 INTRODUCTION

20 Petitioner Fred Baker (C-22918) is a state inmate who alleges that the Board of Parole  
21 Hearings ("Board") violated his due process rights when the panel ordered that his seventh  
22 subsequent parole consideration hearing, held on September 24, 2004, be reheard because the  
23 hearing could not be entirely transcribed. (Petr. at pp. 3-3(a).) Specifically, Baker challenges the  
24 Board's authority to have held a rehearing and concludes that because the Board's actions were  
25 inconsistent with the governing law and his incarceration has exceeded the relevant sentencing  
26 guidelines, he should be released. (Petr. at pp. 3-3(d), Prayer for Relief.) Despite recognizing  
27 the requirement that the entire hearing must be transcribed, the court ordered respondent to show  
28 cause "why any rescheduled hearing should not be heard by the same Board members with

1 instructions to issue a Decision recommending parole." (Order, filed Aug. 23, 2005.) In a  
 2 subsequent order, the court stated that "[g]iven the fact that the transcript contains approximately  
 3 eighty pages of testimony, the Court remains interested in Respondent's position as to why a *de*  
 4 *novi* hearing (one which appears to have reached a different conclusion) was necessary to correct  
 5 Respondent's failure to properly record the September 24, 2004 hearing." (Order, filed Oct. 24,  
 6 2005.)

7 Baker's due process rights were not violated when the Board ordered that his hearing be  
 8 reheard because the law requires that the entire hearing be recorded and transcribed. Further,  
 9 because Baker did not raise the issue in his petition, the court improperly directed respondent to  
 10 justify holding a rehearing rather than having the panel re-create its decision, and the court  
 11 cannot grant any relief on this basis. Accordingly, the petition should be denied.

#### 12 RETURN

13 Respondent, A. Kane, Acting Warden at the Correctional Training Facility, for a return to  
 14 the order to show cause, states:

15 1. Petitioner Fred L. Baker (C-22918) is lawfully in the custody of the Department of  
 16 Corrections and Rehabilitation under a valid judgment of conviction for multiple offenses,  
 17 resulting in a possible life sentence. (Ex. 1.) Baker does not contest the validity of his  
 18 conviction in this petition. (See Petn. at pp. 3-3(a).) Rather, Baker contends that the Board  
 19 violated his due process rights when it ordered that his seventh subsequent parole consideration  
 20 hearing, held on September 24, 2004, be reheard because the entire hearing could not be  
 21 transcribed. (*Ibid.*)

22 2. At his subsequent parole consideration hearing held on September 24, 2004,  
 23 petitioner was present and represented by counsel. (Ex. 2 at pp. 1-2.) The victim and a  
 24 representative from the district attorney's office were also present. (*Id.* at p. 2.) Commissioner  
 25 Susan Fisher and Deputy Commissioner Rolando Mejia conducted the hearing. (*Id.* at p. 2.)  
 26 Commissioner Fisher summarized the commitment offenses (*id.* at pp. 9-15), and Baker  
 27 conceded that the summary was accurate (*id.* at p. 15) and provided additional details.

28 3. Baker, his female cousin (Bernice Habbit), his male juvenile cousin (Canado), and

1 another male juvenile (Ferris) went on a crime spree. (Ex. 2 at p. 25.) On the night of the  
 2 offenses, Canado and Ferris went to Baker's grandmother's house where Baker was, and then  
 3 they all went to his uncle's house where Habbit was. (*Id.* at pp. 57-58.) At his uncle's house,  
 4 Baker smoked marijuana laced with PCP. (*Id.* at pp. 16-18.) Baker and Canado decided, in  
 5 order to get Habbit some milk for her baby, that they would steal a car armed with guns that they  
 6 took from his uncle's house. (*Id.* at p. 26.) Baker decided he would dress up as a woman and  
 7 stand with Habbit on the side of the road, making it easier for someone to pull over. (*Id.* at pp.  
 8 26-27.)

9       4.       Accordingly, their first crime began when Habbit and Baker pretended to be  
 10 hitchhiking, and a man stopped to offer the two "females" a ride. (*Id.* at p. 10.) Thereafter,  
 11 either Ferris or Canado pulled a gun on the driver. (*Ibid.*) The driver was then pulled from his  
 12 station wagon, his wallet was stolen, and he ran for his life as either Ferris or Canado fired a shot  
 13 at him. (*Id.* at pp. 11, 66-67.) After the driver ran off, Baker first took possession of a gun when  
 14 Canado handed it to him from the back seat. (*Id.* at pp. 67-68.) The suspects drove away in the  
 15 victim's station wagon and continued their criminal activities by next committing a robbery and  
 16 kidnaping. (*Ibid.*)

17       5.       Habbit entered a 7-Eleven store and put items on the counter to purchase, but then  
 18 said she had to go to the car to get her money. (Ex. 2 at p. 11.) Shortly thereafter, the three  
 19 males entered the store wearing stocking masks and carrying rifles. (*Id.* at pp. 11-12.) Baker and  
 20 Canado were each pointing a gun at the cashier, Ms. Ingram, and about \$140 was taken from the  
 21 register. (*Id.* at p. 12.) They then put another 7-Eleven employee, Ms. Rommel, in the back of  
 22 the station wagon and ordered Ms. Ingram to provide Ms. Rommel's car keys so the suspects  
 23 could take Ms. Rommel's Pinto. (*Ibid.*) Baker and Canado put Ms. Ingram into the Pinto and  
 24 the station wagon followed. (*Ibid.*) At an orange grove, the suspects ordered Ms. Ingram and  
 25 Ms. Rommel out of the cars and told them to run and get out of sight or they would kill them.  
 26 (*Ibid.*) Canado fired a shot over the victims' heads. (*Id.* at p. 74.) The suspects drove away and  
 27 later pushed the Pinto into the bushes. (*Id.* at p. 13.) The suspects finalized their crime spree by  
 28 shooting and paralyzing a man.

6. Their third crime involved Val Dixon, whose car had broken down. (Ex. 2 at p. 13.) Mr. Dixon had called a tow truck and was returning to his car when the suspects pulled up in the station wagon, and Habbit asked Mr. Dixon if he needed a ride. (*Ibid.*) Mr. Dixon declined, the suspects drove off, but then made a u-turn. (*Ibid.*) When the car approached, Baker was holding a rifle and pointing it at Mr. Dixon, and Baker said "hey sucker." (*Id.* at p. 75.) Mr. Dixon was shot as he attempted to push the gun barrel away from his body. (*Id.* at p. 13.) The suspects drove away. (*Ibid.*) The doctors treating Mr. Dixon discovered that he had been shot twice. (*Id.* at pp. 13-14.) Mr. Dixon is paralyzed from the waist down. (*Id.* at p. 14.)

7. When the police stopped the suspects in the station wagon, Habbit exited the driver's door; Ferris exited and threw away live ammunition; Canado exited; and Baker was found hiding under the vehicle. (Ex. 2 at p. 14.) Two high-powered rifles were found in the back seat and one was found in the front passenger seat. (*Ibid.*) The suspects stated that Canado and Baker both had their guns pointed out the window, and both suspects fired when Mr. Dixon grabbed the guns. (*Ibid.*)

8. In reading the appellate opinion from Baker's criminal conviction, the deputy district attorney identified multiple inconsistencies with Baker's story. First, regarding how the guns were acquired, the deputy district attorney noted that a hardware store had recently been burglarized and guns and ammunition were taken. (Ex. 2 at p. 54.) In addition, laboratory tests of gunshot residue indicated that Baker was the one who shot Dixon, and ballistics tests indicated that the bullet had been fired from one of the guns taken at a hardware store burglary. (*Ibid.*) Further, the station wagon contained rifles taken from the hardware store and used during the crime spree. (*Id.* at p. 56.) Yet, at the hearing, Baker insisted that Canado got the guns from the back of the house (*id.* at p. 60) and that there were guns at the house because his uncle was in law enforcement and went hunting (*id.* at p. 26).

9. At the hearing, Baker contradicted himself multiple times regarding the guns. He initially said that they decided to bring the guns along when they decided to steal a car. (Ex. 2 at p. 26.) Then later, Baker said that they did not talk about bringing the guns; rather, one of the other guys just went and got the guns and brought them along. (*Id.* at p. 83.) In addition, Baker

1 contradicted himself when he explained when he first saw the guns. Baker initially said that  
 2 Canado got the guns from the back of the house and that he saw the guns just before they smoked  
 3 the PCP. (*Id.* at p. 60.) Later, Baker said he saw the guns for the first time when they were  
 4 leaving the house to walk to where they would pretend to hitchhike and then carjack someone.  
 5 (*Id.* at p. 64.)

6 10. Baker's testimony regarding the shooting of Mr. Dixon was faulty. Baker stated  
 7 that his finger was on the trigger when Mr. Dixon slapped the gun and therefore his finger pulled  
 8 the trigger. (*Id.* at p. 21.) Despite contrary evidence, Baker denied that he shot Mr. Dixon twice.  
 9 (*Id.* at pp. 75-77.) When asked to explain how Mr. Dixon got shot twice, Baker speculated that  
 10 one of the other suspects also had his gun pointing out the window, so when he heard Baker  
 11 shoot Mr. Dixon, the other suspect also shot his gun. (*Id.* at p. 49.) Mr. Dixon said he only saw  
 12 one gun pointed at him. (*Id.* at p. 75.)

13 11. Baker's explanation for his behavior is trivial compared to the harm he inflicted  
 14 that night. The week before the offenses, Baker allegedly went into a rage when he learned that  
 15 his girlfriend had aborted their child. (*Id.* at p.16.) Further, these crimes were not an anomalous  
 16 incident to be blamed on the PCP. Rather, the crimes were further evidence of Baker's  
 17 escalating attitude problem. Within the two years prior, Baker had burglarized a store and  
 18 escaped the juvenile facility he was sent to, resulting in Baker being sentenced to the California  
 19 Youth Authority. (Ex. 2 at pp. 19-21.)

20 12. As the deputy district attorney was asking clarifying questions of Baker during the  
 21 hearing, the tape needed to be changed. (Ex. 2 at pp. 83-84.) The rest of the hearing was unable  
 22 to be transcribed. (*Id.* at p. 84; Ex. 3.) At a minimum, what was not transcribed includes the  
 23 victim's statement (ex. 6 at p. 28, lines 18-19 [referring to his testimony "last time"]), and the  
 24 panel's decision (Pen. Code, § 3042, subd. (c) [requiring the hearing officer to state her findings  
 25 and supporting reasons on the record]). According to the written documents prepared at the  
 26 hearing, the panel granted Baker parole and set his total term at 248 months, not including credit  
 27 earned. (Ex. 5.) The panel conspicuously notified Baker on multiple documents that its decision  
 28 was a proposed decision, it was not final, and it would be reviewed. (*Ibid.*)

1        13. During its mandatory review, Daniel Moeller of the Decision Review Unit  
 2 recommended that because the transcript was incomplete, the Board should disapprove the  
 3 September 24, 2004 decision granting parole and schedule a rehearing. (Ex. 3; Moeller Decl. at  
 4 p. 1.) Terry Farmer, the then-chief counsel of the Board of Prison Terms, endorsed the  
 5 recommendation. (*Ibid.*) The Board sitting en banc considered the findings and recommendation  
 6 of the Decision Review Unit, and voted to disapprove the September 24, 2004 proposed decision  
 7 and schedule a rehearing. (Ex. 4.)

8        14. A panel consisting of the same members who granted Baker parole on September  
 9 24, 2004, conducted the rehearing and reached a conclusion opposite to their original decision.  
 10 (Ex. 6 at p. 31.) Baker was denied parole for one year. (*Ibid.*)

11        15. Baker does not establish any grounds for habeas corpus relief.

12        16. A parole consideration decision is not in accordance with the law unless a  
 13 complete hearing transcript is made. The victim (Pen. Code, § 3043, subd. (b)), the district  
 14 attorney (*id.*, § 3042, subd. (a)), and the defendant (*id.*, § 3041.5, subd. (a)(2)) must have an  
 15 opportunity to voice their opinions. Further, the transcript must be available to the public (*id.*, §  
 16 3042, subd. (b)), and it must include the findings and reasons supporting the decision (*id.*, §  
 17 3042, subd. (c)). Finally, the Board (*id.*, § 3041, subd. (b)) and the Governor (*id.*, § 3041.1) must  
 18 be able to competently review the panel's decision.

19        17. The Board did not rescind the panel's finding that Baker was suitable for parole.  
 20 (Cal. Code Regs., tit. 15, §§ 2450 et seq.) Rather, the Board reviewed the panel's decision  
 21 pursuant to sections 2041 et seq. of title 15 of the California Code of Regulations, and properly  
 22 ordered that the decision be disapproved and a rehearing be scheduled. (Cal. Code of Regs., tit.  
 23 15, § 2042 [including that an error of law is a basis for disapproving a decision]; Pen. Code, §  
 24 3041, subd. (b) [providing that the decision of a parole panel will not become final if upon  
 25 review the Board finds that the panel made an error of law].)

26        18. Holding another hearing because Baker's original hearing was unable to be  
 27 transcribed did not violate Baker's due process rights because he does not have a due process  
 28 interest in a proposed decision that was not in accordance with the law.

1 19. Because Baker did not raise the issue in his petition, the court improperly directed  
2 respondent to justify holding a rehearing rather than having the panel re-create its decision, and  
3 the court cannot grant any relief on this basis.

4 20. Except as expressly admitted, respondent denies every allegation of this petition,  
5 including that Baker's administrative, statutory, or constitutional rights were violated when the  
6 Board ordered that Baker's September 24, 2004 parole consideration hearing be reheard.

7 21. Respondent denies that discovery or an evidentiary hearing is necessary in this  
8 case.

9 22. Respondent denies that Baker should be released on parole, on his own  
10 recognizance, or on bail.

11 23. This return is based on the allegations made in the accompanying memorandum of  
12 points and authorities and exhibits, which are incorporated by reference.

13 WHEREFORE, the petition for writ of habeas corpus should be denied, and the order to  
14 show cause should be discharged.

15  
16 Dated: November 23, 2005

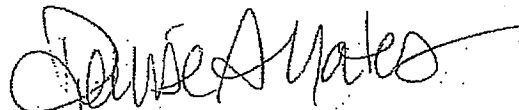
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26  
27  
28

MEMORANDUM OF POINTS AND AUTHORITIES

I. **The Petition Should Be Denied Because the Paramount Concern for Public Safety Would Be Compromised if the Board Was Required to Rely on an Untimely, Re-Created Transcript of the Hearing.**

The Board properly disapproved the September 24, 2004 decision granting Baker parole and requested a rehearing because the hearing transcript was incomplete. Not ordering a rehearing would be contrary to law and public policy. When determining a prisoner's suitability for parole, the overriding concern is for public safety. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1084.) "[B]oth the Legislature and the voters have . . . indicated, in multiple ways, their abiding concern that the Board not schedule the release of *any* life-maximum prisoner who is still dangerous." (*Id.* at p. 1088.) The panel must consider the statements and recommendations of the victim, the judge, the district attorney, the prisoner's trial attorney, the investigating law enforcement agency, and information from the public, and the panel must acknowledge in its decision that it has done so. (*Id.* at pp. 1084-1085.) The California Supreme Court recognized the import of this information being part of the hearing record by finding that public input could be decisive in a parole suitability determination. (*Id.* at p. 1085.)

Because determining one's suitability is such a consequential decision, the decision is not final until it has been subject to multiple levels of review. First, the decision is reviewed and the decision may be affirmed or modified without a new hearing, or a new hearing may be ordered. (Cal. Code of Regs., tit. 15, § 2041, subd. (h).) A new hearing is appropriate if there was an error of law or fact, or based on new information. (*Id.*, § 2042; Pen. Code, § 3041, subd. (b).) If the chief counsel recommends that a new hearing should be held, a new hearing will not be ordered unless a majority of the Board sitting en banc votes to do so. (Pen. Code, § 3041, subd. (b); Cal. Code Regs., tit. 15, § 2041, subd. (h).) Regardless of the Board's decision on review, the Governor has the right to review the decision and request an en banc hearing by the Board. (Pen. Code, § 3041.1.) In that case, the en banc Board cannot grant parole unless a majority of the Board members votes to do so. (*Ibid.*)

Here, the Board's actions of ordering a rehearing were legally mandated. The hearing transcript omitted any further questions by the deputy district attorney, the panel, or Baker's

counsel. (See generally Ex. 2.) In addition, the transcript lacked the victim's statement (ex. 6 at p. 28, lines 18-19 [referring to his testimony "last time"]), and the panel's findings and reasoning for granting Baker parole (Pen. Code, § 3042, subd. (c) [requiring the hearing officer to state her findings and supporting reasons on the record]). Moreover, as is the usual practice, Baker and/or his attorney, as well as the deputy district attorney, likely gave a closing statement that was not included in the transcript. (See Ex. 2, p. ii [reflecting that no closing statements were transcribed]; Ex. 7 at pp. 15-22 [reflecting the deputy district attorney's closing statement]; Ex. 7 at pp. 22-27 [reflecting Baker's attorney's closing statement].) The Board could not effectively fulfill the statutory requirement that the hearing transcripts be made available to the public and be subject to different levels of executive review with such an incomplete transcript.

In addition, relying on the partial transcript or re-creating it based on the panel's recollection is not consistent with public policy. Such reliance is perverse considering that the paramount concern when determining whether someone is suitable for parole is ensuring public safety. Requiring the reviewers of the hearing to rely on the panel's re-created version of a significant part of the hearing, including its decision and reasoning, would be antithetical to ensuring that the soundness of the panel's decision to release a man who continuously gave inconsistent explanations regarding the guns that tormented his carjacking, robbery, and kidnaping victims and finally paralyzed Mr. Dixon.

Further, Baker was not served an injustice. He was aware that the panel's decision finding him suitable for parole was not a final decision and was subject to review. (Ex. 5.) Therefore, he did not have any expectation of being released. (*In re Powell* (1988) 45 Cal.3d 894, 903 [noting that a prisoner "has no vested right in his prospective liberty on a parole release date"].)

In addition, the equitable relief contemplated by the court would be futile. Having the panel members re-create the decision granting parole based on the existing transcript and their recollection would still not cure the fact that the entire transcript was not recorded as required by law.

In summary, yes, Baker is not responsible for the hearing being transcribed in part only.

1 But Baker was not deprived of any due process because there is no regulation or statute  
 2 mandating his release if the panel finds Baker suitable for parole, but the entire hearing,  
 3 including the panel's reasoning supporting its tentative decision, is not transcribed. Rather, the  
 4 process complied with the law. The tentative decision granting parole was reviewed, a rehearing  
 5 was had, and upon further review, the same panel concluded that public safety concerns required  
 6 finding Baker unsuitable for parole. (Cal. Code Regs., tit. 15, § 2281, subd. (a) ["a life prisoner  
 7 shall be found unsuitable for and denied parole if in the judgment of the panel the prisoner will  
 8 pose an unreasonable risk of danger to society if released from prison"]; accord Pen. Code, §  
 9 3041, subd. (b).) Accordingly, the petition should be denied and the order to show cause should  
 10 be discharged.

11 **II. The Petition Should Be Denied Because the Court Improperly**  
 12 **Directed Respondent to Address a Claim that Baker Did Not**  
 13 **Raise in His Petition.**

14 In its order to show cause and subsequent order of October 24, 2005, the court directed  
 15 respondent to address the issue of why a de novo hearing was necessary, rather than just having  
 16 the panel re-create its decision from memory. The court cannot grant relief on this issue because  
 17 Baker did not raise the issue in his petition. It is well-established that a court order directing  
 18 respondent to address issues not raised in the petition is improper. (*Board of Prison Terms v.*  
 19 *Superior Court* (2005) 130 Cal.App.4th 1212, 1237.) In a habeas proceeding, "the petitioner  
 20 bears a heavy burden initially to *plead* sufficient grounds for relief." (*People v. Duvall* (1995) 9  
 21 Cal.4th 464, 474, emphasis in original.) To meet this heavy burden, the petitioner should state  
 22 the facts fully and particularly; conclusory allegations without support are insufficient. (*Ibid.*)

23 Only when the petitioner's initial burden of pleading is met may the court issue an order  
 24 to show cause. (*People v. Duvall, supra*, 9 Cal.4th 464 at pp. 474-475.) "When an order to show  
 25 cause does issue, it is limited to the claims raised in the petition and the factual bases for those  
 26 claims alleged in the petition." (*Id.* at p. 475, [quoting *In re Clark* (1993) 5 Cal.4th 750, 781, fn.  
 27 16].) "The [habeas] case is heard and determined on the issues framed by the pleadings." (*Ex*  
 28 *parte Connor* (1940) 16 Cal.2d 701, 711.) Respondent should be directed to address only those  
 issues. (*Duvall*, at p. 475; *Board of Prison Terms v. Superior Court, supra*, 130 Cal.App.4th at

1 p. 1237.) Therefore, a superior court's discretion in reviewing habeas petitions does not include  
2 adding a claim that the petitioner did not raise in his petition. (See *Board of Prison Terms v.*  
3 *Superior Court, supra*, 130 Cal.App.4th at pp. 1235-1237.)

4 The court's concern with why the Board ordered a rehearing rather than allowing the  
5 panel to re-create its decision from memory is an issue addressing the proper relief and was not  
6 raised by Baker in his petition. In his petition, Baker challenges the Board's authority to have  
7 held a rehearing and concludes that because the Board's actions were inconsistent with the  
8 governing law and his incarceration has exceeded the relevant sentencing guidelines, he should  
9 be released. (Petn. at pp. 3-3(d), Prayer for Relief.) Baker does not contend that the Board  
10 should have proceeded in one manner or another, just that ordering the rehearing was  
11 inconsistent with the governing law. Moreover, Baker does not contend that a re-created hearing  
12 is the appropriate relief. Rather, he contends that he should be released. Thus, because Baker  
13 did not raise the issue in his petition, the court improperly directed respondent to justify holding a  
14 rehearing rather than having the panel re-create its decision, and the court cannot grant any relief  
15 on this basis.

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CONCLUSION

Baker was not deprived of any due process when the Board properly ordered that his parole consideration hearing be reheard in accordance with the law. In addition, the court improperly directed respondent to address an issue that Baker did not raise in his petition. Accordingly, the court should deny the petition and discharge the order to show cause.

Dated: November 23, 2005

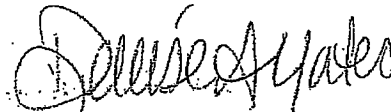
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10 SUPERIOR COURT OF CALIFORNIA  
11 COUNTY OF MONTEREY  
12 SALINAS DIVISION  
13

14 In re

15 FRED L. BAKER,

16 Petitioner,

17 On Habeas Corpus.  
18

NO. HC 04990

DECLARATION OF DANIEL  
MOELLER IN SUPPORT OF THE  
RETURN TO THE ORDER TO  
SHOW CAUSE

19 I, DANIEL MOELLER, declare as follows:


20 1. I am employed by the California Department of Corrections and Rehabilitation.  
21 Since May 2005, I have been a deputy commissioner for the Board of Parole Hearings. For  
22 approximately five years before that, I was a staff counsel for the Board of Prison Terms where  
23 my duties included reviewing the proposed decisions of parole consideration hearings for any  
24 errors of law or fact.

25 2. I am familiar with the Decision Review Unit's recommendation regarding the  
26 seventh subsequent parole consideration hearing on September 24, 2004, for inmate Fred Baker  
27 (C-22918). I signed the recommendation on behalf of the Decision Review Unit, and the then-  
28 chief counsel of the Board of Prison Terms, Terry Farmer, endorsed the recommendation.

1           3.     I am also familiar with the statutes and regulations governing parole consideration  
 2 decisions and the Board's mandatory review of them. When as in Baker's case, a significant  
 3 portion of the transcript is unable to be transcribed, the hearing is not in accordance with the law.  
 4 The victim (Pen. Code, § 3043, subd. (b)), the district attorney (*id.*, § 3042, subd. (a)), and the  
 5 defendant (*id.*, § 3041.5, subd. (a)(2)) must have an opportunity to voice their opinions. The law  
 6 requires that the transcript must be available to the public (Penal Code, § 3042, subd. (b)), and it  
 7 must include the findings and reasons supporting the decision (*id.*, § 3042, subd. (c)). In  
 8 addition, the Board (*id.*, § 3041, subd. (b)) and the Governor (*id.*, § 3041.1) must be able to  
 9 competently review the panel's decision.

10           4.     In order to comply with the law, the appropriate remedy for such an incomplete  
 11 transcript was to order the decision be disapproved and a rehearing be scheduled. (Cal. Code of  
 12 Regs., tit. 15, § 2042 [including that an error of law is a basis for disapproving a decision]; Pen.  
 13 Code, § 3041, subd. (b) [providing that the decision of a parole panel will not become final if  
 14 upon review the Board finds that the panel made an error of law].)

15           I declare under penalty of perjury that the foregoing is true and correct and that this  
 16 declaration was executed on November 23, 2005.

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 20 DANIEL MOELLER  
 21 Deputy Commissioner, Board of Parole Hearings  
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Exh. L.

## SUPERIOR COURT OF CALIFORNIA

## COUNTY OF MONTEREY

FILED

DEC 23 2005

In re

HC 04990

LISA M. GALDOS  
CLERK OF THE SUPERIOR COURT  
~~L. MORRIS~~ DEPUTY

FRED L. BAKER

On Habeas Corpus

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TRAVERSE/RESPONSE TO RETURN TO  
ORDER TO SHOW CAUSE; MEMORANDUM  
AND POINTS AND AUTHORITIES  
IN SUPPORT OF RELIEF

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7 SUPERIOR COURT OF CALIFORNIA  
8 COUNTY OF MONTEREY  
9  
10

11 In Re

HC 04990

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14  
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TRAVERSE/RESPONSE TO  
RESPONDENT'S RETURN TO ORDER  
TO SHOW CAUSE; MEMORANDUM OF  
POINTS AND AUTHORITIES IN  
SUPPORT OF RELIEF

16 INTRODUCTION

17 On August 23, 2005 this Court ordered Respondents to show  
18 cause why Petitioner should not be granted the relief sought in  
19 his petition. Specifically, Respondents were ordered to show  
20 cause why any rescheduled parole hearing should not be heard by  
21 the same Board members who heard the September 24, 2004 hearing,  
22 with instructions to issue a decision recommending parole.  
23 Petitioner was provided appointed counsel through the Alternate  
24 Defender's Office of Monterey County, with above named attorney  
25 receiving a copy of the O.S.C. on or around September 1, 2005.

26 Respondents had been granted an extension of time to file  
27 their Return, which under the original Order to Show Cause issued  
28

1 in this matter was due on September 27, 2005. Respondents  
2 informed the Court in the Request for an Extension, that a  
3 hearing had been rescheduled for Oct. 4, 2005 in front of the  
4 same commissioners. Respondents took advantage of this Court  
5 granting the extension requested by conducting a *de novo* hearing,  
6 which predictably resulted in a recommendation against parole.  
7 In so doing, it appears Respondents were attempting to avoid  
8 justifying why Petitioner was not entitled to the relief sought.

9 On November 23, 2005, Respondent's filed their Return. This  
10 Return attempts to address both the original Order to Show Cause,  
11 and a subsequent order issued by this Court in response to a  
12 letter from Respondents, dated October 5, 2005, in which it was  
13 indicated that no response to the Request for an Extension to  
14 File had been received and also requesting "that the Court advise  
15 the parties if it is going to modify the Order to Show Cause,  
16 namely, whether Respondent should still address why inmate  
17 Baker's should not be heard by the same Board members with  
18 instructions to issue a decision recommending parole."

19 Essentially this request to "modify" the O.S.C. was Respondent  
20 asking the Court if they are still required to show cause why  
21 Petitioner was not entitled to relief, because they had taken  
22 steps not to provide the requested remedy but rather designed to  
23 avoid having to answer to the Court. Further, despite  
24 Respondents asking the Court to issue an order based on their  
25 request, respondent suggest in their Return that the Court had no  
26 authority to question why they proceeded in a manner wholly  
27 inconsistent with the Court's original order. (Please see the  
28 transcript from the Oct. 4, 2005, hearing, attached to the Return

1 as Exhibit 6, in which it is stated that the proceeding is a  
2 "rehearing" pursuant to a court order [pg.1, lines 20-27 and  
3 pg.2, lines 1-22], yet they clearly do not proceed in accordance  
4 with that order as they conducted a *de novo* hearing, including  
5 admittedly different testimony from the victim [starting at pg.  
6 28, line 12] and new argument from the D.A. [starting at pg.  
7 15]).

8 Petitioner was given until December 16, 2005 to file a  
9 Traverse in this matter. A one week Extension of time to file  
10 was requested and granted, making the Travers due by December 23,  
11 2005.

12 This Traverse/Response is submitted to present additional  
13 facts in support of the claims on which the Order to Show Cause  
14 was issued. It hereby incorporates by reference the Petition for  
15 Writ of Habeas Corpus, exhibits attached thereto, and the other  
16 pleadings filed in this matter, and the attached Memorandum of  
17 Points and Authorities, in support of its motion that this Court  
18 grant the relief requested.

#### 19 20 DENIALS AND EXCEPTIONS

21 1. Petitioner contest and takes exception to the Return, in  
22 that paragraphs 8 through 11 fail to affirmatively state facts  
23 that contradict the factual allegations in the Petition for Writ  
24 of Habeas Corpus. Specifically, the above cited paragraphs deal  
25 with matters not addressed in the Petition, making them non-  
26 responsive, and thereby irrelevant, as responses to the factual  
27 allegations in the Petition.

28 2. Petitioner denies and takes exception to the portion of

1 paragraph one that alleges his custody is lawful and proper.

2 3. Petitioner admits that paragraphs 2 through 7 are  
3 factually accurate based on the record.

4 4. Respondent takes exception to paragraph 12 of the Return  
5 in that it alleges the September 24, 2004 hearing was unable to  
6 be transcribed. Nowhere in the transcriber's declaration does  
7 she indicate any problem with transcribing the one tape provided  
8 to her, nor is there anything within the declaration of Daniel  
9 Moeller, indicating that he ever consulted with the transcriber  
10 regarding either the presence of or the malfunctioning of a  
11 second tape. ( See Exhibit 2 of Return, pg. 84, lines 3-4 and  
12 Exhibit 4 of the Return) The issue that must be addressed is in  
13 regard to the apparently missing second tape, which was never  
14 presented to the transcriber. (See Exhibit 2 of the Return, pg.  
15 84 indicating "no further tapes were received for  
16 transcription").

17 5. Petitioner admits that paragraph 13 of th Return is  
18 true.

19 6. Petitioner admits the factual information in paragraph  
20 14 of the Return, but takes exception to ~~the~~ any suggestion that  
21 the Oct. 4, 2005 hearing, and the result reached therein, should  
22 impact his request for relief based on the inequities that  
23 occurred subsequent to the September 24, 2004 hearing.

24 7. Petitioner denies and takes exception to paragraph 15 of  
25 the Return.

26 8. Petitioner denies and takes exception to paragraph 16 of  
27 the Return, as it suggests that a parole hearing decision is not  
28 in accordance with the law unless a complete transcript is made.

1 To the contrary, the decision made at the September 24, 2004  
2 hearing was in accordance with the law. Petitioner was given the  
3 opportunity to be heard, as were the victim and others, a written  
4 statement setting forth the recommendation of parole was  
5 generated, as were documents regarding the condition of release  
6 and consequences for failure to meet those conditions.

7 9. Petitioner denies and takes exception to paragraph 17 of  
8 the Return, in that it alleges that the Board properly ordered  
9 that the September 24, 2004 decision be disapproved and a new  
10 hearing be rescheduled. Such action is the basis of the petition  
11 in this matter.

12 10. Petitioner denies and takes exception to paragraph 18  
13 of the Return in that it alleges that ordering of rehearing was  
14 not in violation of Petitioner's due process rights.  
15 Respondents's cannot carry their burden of establishing a record  
16 that would support their position.

17 11. Petitioner denies and takes exception to paragraph 19  
18 of the Return, in that it states this Court is without the power  
19 and authority to direct Respondent to justify the need for a de  
20 novo hearing, rather than having the panel recreate their prior  
21 decision from the transcript and their own recollection. Case  
22 law provides that the Superior Court has the power to re-state  
23 inartfully drafted claims for the purpose of clarity. Aside from  
24 that, this Court clearly has authority to direct the Respondents  
25 to justify their action in response to a request by Respondents  
26 themselves asking that they not be required to do so.

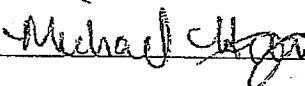
27 12. Except as expressly admitted in this Traverse,  
28 Petitioner denies and takes exception to each and every

1 allegation contained in the Return.

2       THEREFORE, the Petition for Writ of Habeas corpus should be  
3 granted, and the Respondents be ordered to release Petitioner  
4 forthwith.

5  
6 Dated: December 23, 2005

Respectfully Submitted,

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9 Michael Herro

10 Attorney for Petitioner  
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MEMORANDUM OF POINTS AND AUTHORITIES  
IN SUPPORT OF RELIEF

I

RESPONDENTS FAILED TO ADDRESS THE FACTUAL ALLEGATION  
OF THE PETITION THAT FORMED THE BASIS OF PETITIONER'S  
CLAIM AND MISSTATED THE FACTS AS SET FORTH THEREIN

The error of law that the Respondents keep reiterating is  
misstating the facts as stated in the factual allegations of the  
habeas corpus. From the very beginning, Petitioner has held the  
position that there was never a malfunctioning of the recording  
equipment, but rather, a second tape that is missing. Respondents  
had the burden of establishing the record. Thus, it is important  
to note that it was Respondent, rather than Petitioner, who failed  
to record the "Decision" portion of the hearing as required by  
Penal Code § 3042.

Respondents had clearly mandated available remedies to avail  
themselves of what they're now labeling as an error of law. See  
(Penal Code § 3041(b) and Cal. Code of Regs., tit. 15, § 2254.) It is  
through these remedies that Respondents were able to ascertain a  
written summary of the evidence considered, the evidence relied on,  
and the findings of the hearing panel with supporting reasons. There-  
fore, making the record available to the public, and preserving the  
Board and Governor their statutory right to review the parole  
grant. Consequently, addressing the concerns of Penal Code § 3042,  
subds. (b) & (c). Respondents failed to address this apparent  
inequity in their Informal Response, and continue to do so in the  
present Return.

The habeas procedure as stated in the Penal Code contemplates  
the custodian of the confined person shall file a responsive

1 pleading called a return. Accordingly, the California Supreme  
2 Court has required more of the return than mere compliance with the  
3 literal language of section § 1480; the Court requires the return  
4 to "allege with facts tending to establish the legality of  
5 petitioner's detention." See In re Sixto, (1989) 48 Cal.3d 1247,  
6 1252; "The return ... must allege facts establishing the legality  
7 of the petitioner's custody." See People v. Romero, (1994) Cal.4th  
8 728; "return must allege facts." See In re Lawler, (1979) 23  
9 Cal.3d 190, 194. The Court further noted:

10 "The requirement that the return allege facts responsive to the  
11 petition is critical, for the factual allegations in the return  
12 are either admitted or disputed in the traverse and this  
13 interplay frames the factual issues that the court must decide.  
Facts set forth in the return that are not disputed in the  
traverse are deemed true."

14 See People v. Duvall, (1995) 9 Cal.4th 464 (citing Lawler, supra,  
15 23 Cal at p. 194).

16 In the present case, Respondents filed a return that did not  
17 dispute the material facts alleged by Petitioner. Accordingly,  
18 this Court must find that Respondent is deemed to admitted those  
19 material factual allegations that they've failed to dispute. See  
20 Sixto, supra, 48 Cal.3d at 1252.

21 ///

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## II

PURSUANT TO PENAL CODE SECTION 3041(b) AND THE CALIFORNIA CODE OF REGULATIONS TITLE 15, DIVISION TWO, SECTION(S) 2041, 2042, 2044 AND 2451, THE BOARD OF PAROLE HEARINGS HAS LOST JURISDICTION TO PRESIDE OVER PETITIONER'S PAROLE APPLICATION

A. Governing Statute

Penal Code § 3041(b) provides in pertinent part:

"a decision of the parole panel finding an inmate suitable for parole shall become final within 120 days of the date of the hearing. During that period, the board may review the panel's decision. The panel's decision shall become final ... unless the board finds that the panel made an error of law, or that the panel's decision was based on an error of fact, or that new information should be presented to the board, any of which when corrected or considered by the board has a substantial likelihood of resulting in a substantially different decision upon a rehearing. In making this determination, the board shall consult with the commissioners who conducted the parole consideration hearing."

B. Governing Regulations 2/

Board regulations defining the time and manner in which suitability determinations are to be reviewed, disapproved or rescinded are set forth in four sections.

1) Mandatory Time-Limits

Section 2041, establishes that a reconsideration panel shall, within a maximum period of twenty days or a board review committee shall, within a maximum period of 60 days from the date of the hearing:

"(i) affirm the original proposed decision, (ii) order a new hearing, or (iii) modify the decision without a new hearing."

(subd. (d)1 & 2), and in the event of an en banc referral "the full board shall review within a maximum period of forty-five days from the date of the hearing any proposed decision referred by a member of the hearing panel who requested the full board to consider the case." 2044.

2. At the time Petitioner was found suitable for parole, the language cited by the Deputy Attorney General was not part of Cal. Code of Regs., tit. 15, §§ 2041, 2042. Thus, it's not applicable to the issues before the Court.

2) Specified Criteria.

Section 2042 provides the criteria for disapproval of a decision, which include:

"clerical errors, apparent inconsistency of result from results generally obtained for the same or similar cases, incorrect application of the law (statutes or regulations), a decision not supported by the findings, findings not supported by the evidence on the record, or a unique or unusual policy issue posed by the proposed decision",

and section 2451 identifies conduct upon which "good cause" for rescission must be premised; including:

"(1) any disciplinary conduct subsequent to the parole grant, (2) psychiatric deterioration of the prisoner, (3) fundamental errors occurred, resulting in the improvident granting of a parole date, and (4) new information indicating parole should not occur, such as an inability to meet a special condition of parole, information significant to the original grant of parole being fraudulently withheld from the board."

C. Standard of Review

This Court is "authorized to review the factual basis of a decision of the Board denying parole in order to ensure that the decision comports with the requirements of due process of law." See In re Rosenkrantz, (2002) 29 Cal.4th 616, 677.

"[I]n conducting such a review, the court may require only whether some evidence in the record before the Board supports the decision to deny parole, based upon the factors specified by statute and regulations. If the decision's consideration of the specified factors is not supported by some evidence in the record and thus is devoid of factual basis, the court should grant the prisoner's petition for writ of habeas corpus and should order the Board to vacate its decision denying parole and thereafter to proceed in accordance with due process of law."

Id. at 658. "To impose a standard of review that is less stringent than the 'some evidence' test set forth in Powell [45 Cal.3d 894] would permit the Board to render a decision without any basis in fact. Such a decision would be arbitrary and capricious, thereby depriving the prisoner of due process of law." Id. at 657-58.

Judicial oversight must be extensive enough to protect the limited right of parole applicants "to be free from an arbitrary parole decision ... and to something more than mere pro forma consideration." See In re Sturm, (1974) 11 Cal.3d 258, 268.

In the context of parole, the requirements of due process are satisfied if "some evidence" supports the decision. See McQuillion v. Duncan, 306 F.3d 895, 904 (9th Cir. 2002). Moreover, in accordance with the United States Supreme Court's decision in Superintendent v. Hill, 475 U.S. 445, 86 L.Ed.2d 356, 105 S.Ct. 2768 (1985) and the Ninth Circuit's decision in Jancsek v. Oregon Bd. of Parole, 883 F.2d 1389 (9th Cir. 1987), the California Supreme Court has indicated that there must be "some evidence" supporting parole rescission. See Powell, supra, 45 Cal.3d at 904.

In this Court, Respondents had placed their "some evidence" claim in a significantly different posture because none of the evidence supporting "good cause" was presented as in other courts (E.g., Caswell, McQuillion, Powell, Rosenkrantz). Additionally, in bold contrast to the California Supreme Court's recent opinion in In re Dannenberg, (2005) 34 Cal.4th 1061, Respondents overturned and ordered reheard the granting panel's finding of suitability simply by failing to locate and transcribe the "[missing] tape" (Ex. 2, p. 84:3-4) or take advantage of the alternative remedies.<sup>3/</sup>

Because the time already served by Petitioner is in gross excess of the established guidelines for his commitment offense, his continued incarceration further advances the "excessive confinement" threshold that the Supreme Court has held to violate

3. By way of example, Petitioner request this Court to take Judicial Notice of In re FREDDY FIKES, (B-65105), as the proceeding plainly governs the situation in this case. See Appendix B; BPT-1000(a) Denial-Worksheet attached hereto. The decision worksheet applicable to the present case is attachment Appendix A.

1 the cruel and unusual punishment clause (art. I, § 17) of the  
2 California Constitution. See In re Rodriguez, (1975) 14 Cal.3d  
3 639, 646-656.

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III

AFTER PETITIONER SUCCESSFULLY CONTROVERTED THE  
FACTUAL INFORMATION SUBMITTED WITH RESPONDENTS'  
INFORMAL RESPONSE, 'THE COURT PROPERLY DIRECTED  
RESPONDENTS TO ADDRESS THE CLAIM RAISED IN THE  
PETITION ON WHICH THE ORDER TO SHOW CAUSE WAS  
ISSUED.

The goal of the procedures that govern habeas corpus is to  
provide "a framework in which a court can discover the truth and do  
justice in a timely fashion." See Board of Prison Terms v.  
Superior Court, (2005) 31 Cal.Rptr.3d 70, 90 (citing People v.  
Duvall, supra, 9 Cal.4th at 482.) Thus, when presented with a  
petition for writ of habeas corpus, the court evaluates it by  
asking "whether, assuming the petitioner's factual allegations are  
true, the petitioner would be entitled to relief?" See Romero,  
supra, 8 Cal.4th at 738.

If the court finds that the petition states a prima facie  
case, "the Court is obligated by statute to issue a writ of habeas  
corpus." See Romero, supra, 8 Cal.4th at 737; Duvall, supra,  
9 Cal.4th at 474. In crafting the Order to Show Cause the Court  
has the power to "explain its preliminary assessment of the  
petitioner's claims, re-state inartfully drafted claims for the  
purposes of clarity, and limit the issues to be addressed in the  
return to only those issues for which a prima facie showing has  
been made." See Board of Prison Terms v. Superior Court, supra,  
31 Cal.Rptr.3d at 89-90. Once the Court has decided that habeas

1 relief is warranted, "it authorizes the court to fashion a remedy  
2 for the deprivation of any fundamental right which is cognizable on  
3 habeas corpus." See Board of Prison Terms v. Superior Court,  
4 supra, 31 Cal.Rptr.3d at 87.

5 In fashioning a remedy for the apparent inequity Petitioner  
6 suffered at the hands of Respondents, the Court noted that  
7 Respondents' Informal Response failed to "discuss several important  
8 issues, including: 1) when Petitioner's rescheduled hearing is set  
9 to occur, 2) whether the same Board members will preside over the  
10 rescheduled hearing and 3) whether the rescheduled hearing will  
11 involve a de novo review of Petitioner's suitability for parole or  
12 simply a review of the decision." OSC, page 1:20-25. The Court  
13 then summarized that "the most equitable solution would be to  
14 reschedule the hearing before the same Board members with  
15 instructions to adopt the existing transcript from the former  
16 hearing and recreate their Decision to recommend parole based on  
17 that transcript and their independent recollection. Accordingly,  
18 Respondent is Ordered to Show Cause why Petitioner should not be  
19 granted the relief sought in his Petition. Specifically,  
20 Respondent is Ordered to Show Cause why any rescheduled hearing  
21 should not be heard by the same Board members with instructions  
22 to issue a Decision recommending parole." OSC, page 2:3:13.

23 After Petitioner was found unsuitable for parole, by the same  
24 Board members at the October 4, 2005, hearing, involving a de novo  
25 review, the Court denied Respondents' request that the Court  
26 modify its Order to Show Cause and indicated that "the Court  
27 remains interested in Respondent's position as to why a de novo  
28 hearing (one which appears to have reached a different conclusion)

1 was necessary to correct Respondent's failure to properly record  
2 the September 24, 2004, hearing."

3 In its answer, Respondents note "relying on the partial  
4 transcript or re-creating it based on the panel's recollection is  
5 inconsistent with public policy. Such a reliance is perverse  
6 considering that the paramount concern when determining whether  
7 someone is suitable for parole 'is ensuring public safety.'"

8 Objections, page 9:11-14. Respondents neglect to mention in their  
9 objections that the Board has prescribed a rule that governs the  
10 Court's equitable solution, in which Respondents rely on the  
11 partial transcript and adopts the panel's decision and reasoning  
12 for the decision from an alternative source. See Appendix B.

13 Further, Respondents offers no evidence to show that Petitioner  
14 has become an unreasonable risk of danger or risk to public safety  
15 since his finding of suitability. See Caswell, supra, 92 Cal.App.  
16 4th at 1027 (holding that "a rescission may not be upheld merely  
17 because the Board has mouth words that have been held to  
18 constitute 'cause' for rescission. There must be a factual under-  
19 pinning for the Board's determination cause.")

20 Finally, Respondents conclude that "the court's concern with why the Board  
21 ordered a rehearing rather than allowing the panel to re-create its  
22 decision from memory is an issue addressing the proper relief  
23 and ... because [Petitioner] did not raise the issue in his  
24 petition, the court improperly directed respondent to justify  
25 holding a rehearing rather than having the panel re-create its  
26 decision, and the court cannot grant any relief on this basis."  
27 Objections, page 11:4-15.

28 Respondents err. The fundamental nature of the Due Process

1 claim is based on the fact that the Board of Parole Hearings  
2 rescinded its September 24, 2004, finding that Petitioner was  
3 suitable for parole based solely on the fact that the Board lost  
4 the decision portion of the transcript from the hearing has not  
5 changed.

6 Certainly new details arose during the discovery portion of  
7 this matter. For example, we learned that the rescheduled hearing  
8 was set to be held on October 4, 2005, in front of the same  
9 commissioner and deputy commissioner who conducted the September  
10 24, 2004 suitability hearing. But none of the new facts developed  
11 in discovery fundamentally altered the facts alleged in petition or  
12 claims made before the Court. Accordingly, the Court has properly  
13 directed Respondents to address the claims raised in the petition,  
14 and can grant the relief requested.

#### 15 CONCLUSION

16  
17 In closing, Petitioner would simply like to emphasize, it has  
18 been over a year since his finding of suitability and nothing has  
19 changed from the time of the parole grant to indicate that parole  
20 should not occur.

21 While it is most certainly within this Court's discretion to  
22 remand back to the Board, it is note-worthy to point out that  
23 Respondents have had many opportunities to avail themselves of  
24 available remedies, including the remedy fashioned by this Court,  
25 but failed to do so. Given the fact that Respondents take the  
26 position that the "equitable relief contemplated by the court  
27 would be futile." Objections, page 9:24. There is no reason to  
28 remand back to the Board.

1 In a somewhat analogous situation, the California Court of  
2 Appeals declined to remand to the Governor, The Court explained:

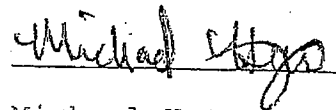
3 "Although the Board can give a prisoner a new hearing and  
4 consider additional evidence, the Governor's constitutional  
5 authority is limited to review of the materials provided by the  
6 Board. Since we have reviewed the materials that were before the  
7 Board and found no evidence to support a decision other than the  
8 one reached by the board, a remand to the Governor in this case  
9 would amount to an idle act." (In Re Smith, (2003) 109  
10 Cal.App.4th 489, 507).

11 In the absence of any evidence in the record supporting the  
12 Board's decision, remanding the case for a new hearing would be  
13 futile, and the appropriate remedy is to grant the release of  
14 Petitioner. (McOuillion v. Duncan II (9<sup>th</sup> Cir., 2003) 342 F.3d  
15 1012, 1015-1016).

16 Respondents have not cited any evidence, nor provided  
17 convincing argument refuting the points made in the Petition and  
18 outlined in Petitioner's previously filed informal response.  
19 They fail to address or justify their position in light of the  
20 order to Show Cause. Thus, the Court should grant the Petition  
21 and order Respondents to release Petitioner from incarceration  
22 forthwith.

23 Dated: December 23, 2005

Respectfully Submitted,

24 

Michael Herro

25 Attorney for Petitioner  
26  
27  
28

Exh M.

1 Michael Herro, Attorney at Law  
SBN: 233749

2 Law Office of Michael Herro  
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3 Salinas, California 93901

4 Phone and fax (831) 753-0992

5 Attorney for Petitioner Fred L. Baker

**FILED**

JUL 10 2006

LISA M. GALDOS  
CLERK OF THE SUPERIOR COURT  
K. HANSON DEPUTY

6 SUPERIOR COURT OF MONTEREY COUNTY

7 IN AND FOR THE STATE OF CALIFORNIA

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12 IN RE  
13 FRED L. BAKER  
14 ON HABEAS CORPUS

HC 04990

AMENDED/SUPPLEMENTAL

PETITION AND ATTACHMENTS

Dept. 9- Judge Anderson

15  
16  
17  
18 On June 5, 2006 an Order was issued by this Court granting  
19 leave to Petitioner to file a supplement or amendment to his  
20 original petition by addressing certain facts that in the  
21 Court's view had not been raised expressly or implicitly in the  
22 original petition and pleadings filed in this matter. The  
23 Order stated any supplement or amendment be filed within 30  
24 days of issuing the Order. It was mailed to counsel for  
25 Petitioner. The Order was received on or about June 8, 2005.  
26 Based on receiving service by mail, under C.C.P. 1013, this  
27 amended/supplemental petition was to be filed within 35 days  
28

1 from the date the Order issued.

2 Specifically, the Court gave Petitioner leave to address  
3 whether the Board of Prison Terms lost jurisdiction to preside  
4 over parole suitability hearings held subsequent to the  
5 challenged September 24, 2004 hearing, pursuant to Penal Code  
6 sections 3041(b), 2041, 2042 and 2451. Further, the Court  
7 invited Petitioner to attach the following to any supplement or  
8 amendment to the petition; 1.) the Board's written statement  
9 recommending that parole be granted, 2.) forms and documents  
10 generated and used by the Board in connection with Petitioner's  
11 hearing, and 3.) a further declaration in which Declarant

12 properly authenticates and identifies documents referred to in  
13 his declaration. The declaration referred to above is that of  
14 Freddy Fikes, another inmate who was involved in a situation  
15 where a portion of his parole suitability hearing was not tape  
16 recorded, but a *de novo* rehearing wasn't necessary because the  
17 Board could rely on certain documents produced as part of the  
18 hearing in making their decision whether to grant or deny  
19 parole.

20

21 AMENDMENT OF ORIGINAL PETITION TO INCLUDE CLAIM THAT BOARD LOST  
22 JURISDICTION TO PRESIDE OVER "REHEARING" OF THE PAROLE  
23 SUITABILITY HEARING CONDUCTED ON SEPTEMBER 24, 2004 BECAUSE OF  
24 TIME LIMITS SET BY PENAL CODE SECTION 3041(B) AND CALIFORNIA  
25 CODE OF REGULATIONS, TITLE 15, DIVISION TWO, SECTIONS 2041,  
26 2042, 2044 AND 2451.

27 Petitioner hereby request that the above claim be amended  
28 to and included as part of original petition for Habeas Corpus

1 filed in this matter on Jan. 27, 2005, as an additional ground  
2 on which to base the Petitioner's claim for relief.

3 Petitioner was found suitable for parole following a full  
4 hearing conducted on September 24, 2004. On November 30, 2006  
5 the Decision Review Unit recommended that the 9/24/2004  
6 decision be disapproved and that a rehearing be conducted on  
7 the matter on the next available calender. Then, on December  
8 14, 2004, the Board of Prison Terms voted disapprove of the  
9 proposed decision to grant parole.

10 These actions were taken despite the time limits  
11 delineated in 15 CCR 2041, and the other sections cited above,  
12 and therefore were taken at a time when both the Decision  
13 Review Unit and the Board of Prison Terms had lost jurisdiction  
14 over the matter. The Traverse filed in this matter fully  
15 addresses the statutory time limits referred to above,  
16 appearing as section "II", and is hereby incorporated by  
17 reference. Petitioner respectfully request the Court consider  
18 the legal citations and argument in the above mentioned  
19 pleading as support for the above claim.

20 ATTACHMENTS

21 As previously stated, through the Order issued by the  
22 Court on June 5, 2006, Petitioner was granted leave to attach  
23 to this amended/supplemental petition certain documents.

24 Accordingly, the following have been attached;

25 1. "The Board's written statement recommending that parole be  
26 granted."

27 Attached as Exhibit A to this amended/supplemental  
28 petition is BPT Form 1001, generated and signed at the

1 September 24, 2004 hearing, a copy of which was obtained by  
2 Petitioner from his Central File, which is kept at Correctional  
3 Training Facility-Soledad, where he is incarcerated.

4 2. "Forms and documents generated and utilized by the Board in  
5 connection with Petitioner's (Sept. 24, 2004) hearing."

6 Petitioner and his counsel made attempts to obtain  
7 documents relevant to the above mentioned materials,  
8 specifically the BPT 1000(b) [Setting a Term-Life Prisoner  
9 Parole Granted] form that was generated as a result of  
10 Petitioner's 9/24/2004 hearing. an informal request made by  
11 Petitioner's counsel that any such "forms and documents" be  
12 provided, pursuant to the Court's 6/5/2006 Order was made on or  
13 around June 23, 2006. Counsel for the Respondents replied by  
14 a two-page letter, dated June 28, 2006, which has been attached  
15 to this amended/supplemental petition as Exhibit B.

16 The Petitioner himself also made efforts to obtain such  
17 forms and documents through the prison where he is  
18 incarcerated. A declaration by Petitioner, [which includes its  
19 own exhibits, numbered 1-4], has been attached to this  
20 amended/supplemental petition as Exhibit C.

21 Based on the above, Petitioner request that the Court  
22 order Respondent to produce for review by both the Petitioner  
23 and the Court the BPT 1000(b) form referenced above and any  
24 other "forms and documents" that might be attached by  
25 Petitioner in response to the Court's 6/5/2006 Order.

26 3. "A further declaration in which Declarant (Freddy Fikes)  
27 properly authenticates and identifies the documents to which he  
28 refers."

1 A declaration from Mr. Freddy Fikes, [with it's own  
2 exhibits, labeled, by Declarant, Appendix B(2)(3) and (4)] has  
3 been attached to this amended/supplemental petition Exhibit D.  
4

5 Dated: July 10, 2006

Respectfully Submitted,

6 Michael Herro

7 Michael Herro, Attorney for Petitioner  
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Exh N.

Exh C.

1 Michael Herro, Attorney at Law  
SBN: 233749  
2 Law Office of Michael Herro  
134 Central Ave.  
3 Salinas, California 93901  
4 Phone and fax (831) 753-0992  
5 Attorney for Petitioner Fred L. Baker

**FILED**

JUL 10 2006

LISA M. GALDOS  
CLERK OF THE SUPERIOR COURT  
K. Hanson DEPUTY

6  
7 SUPERIOR COURT OF MONTEREY COUNTY  
8  
9 IN AND FOR THE STATE OF CALIFORNIA  
10

11 IN RE  
12 FRED L. BAKER  
13 ON HABEAS CORPUS

HC 04990  
AMENDED/SUPPLEMENTAL  
PETITION AND ATTACHMENTS  
Dept. 9- Judge Anderson

14  
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16  
17  
18 On June 5, 2006 an Order was issued by this Court granting  
19 leave to Petitioner to file a supplement or amendment to his  
20 original petition by addressing certain facts that in the  
21 Court's view had not been raised expressly or implicitly in the  
22 original petition and pleadings filed in this matter. The  
23 Order stated any supplement or amendment be filed within 30  
24 days of issuing the Order. It was mailed to counsel for  
25 Petitioner. The Order was received on or about June 8, 2005.  
26 Based on receiving service by mail, under C.C.P. 1013, this  
27 amended/supplemental petition was to be filed within 35 days  
28

1 from the date the Order issued.

2 Specifically, the Court gave Petitioner leave to address  
3 whether the Board of Prison Terms lost jurisdiction to preside  
4 over parole suitability hearings held subsequent to the  
5 challenged September 24, 2004 hearing, pursuant to Penal Code  
6 sections 3041(b), 2041, 2042 and 2451. Further, the Court  
7 invited Petitioner to attach the following to any supplement or  
8 amendment to the petition; 1.) the Board's written statement  
9 recommending that parole be granted, 2.) forms and documents  
10 generated and used by the Board in connection with Petitioner's  
11 hearing, and 3.) a further declaration in which Declarant

12 properly authenticates and identifies documents referred to in  
13 his declaration. The declaration referred to above is that of  
14 Freddy Fikes, another inmate who was involved in a situation  
15 where a portion of his parole suitability hearing was not tape  
16 recorded, but a *de novo* rehearing wasn't necessary because the  
17 Board could rely on certain documents produced as part of the  
18 hearing in making their decision whether to grant or deny  
19 parole.

20

21 AMENDMENT OF ORIGINAL PETITION TO INCLUDE CLAIM THAT BOARD LOST  
22 JURISDICTION TO PRESIDE OVER "REHEARING" OF THE PAROLE  
23 SUITABILITY HEARING CONDUCTED ON SEPTEMBER 24, 2004 BECAUSE OF  
24 TIME LIMITS SET BY PENAL CODE SECTION 3041(B) AND CALIFORNIA  
25 CODE OF REGULATIONS, TITLE 15, DIVISION TWO, SECTIONS 2041,  
26 2042, 2044 AND 2451.

27 Petitioner hereby request that the above claim be amended  
28 to and included as part of original petition for Habeas Corpus

1 filed in this matter on Jan. 27, 2005, as an additional ground  
2 on which to base the Petitioner's claim for relief.

3 Petitioner was found suitable for parole following a full  
4 hearing conducted on September 24, 2004. On November 30, 2006  
5 the Decision Review Unit recommended that the 9/24/2004  
6 decision be disapproved and that a rehearing be conducted on  
7 the matter on the next available calender. Then, on December  
8 14, 2004, the Board of Prison Terms voted disapprove of the  
9 proposed decision to grant parole.

10 These actions were taken despite the time limits  
11 delineated in 15 CCR 2041, and the other sections cited above,  
12 and therefore were taken at a time when both the Decision  
13 Review Unit and the Board of Prison Terms had lost jurisdiction  
14 over the matter. The Traverse filed in this matter fully  
15 addresses the statutory time limits referred to above,  
16 appearing as section "II", and is hereby incorporated by  
17 reference. Petitioner respectfully request the Court consider  
18 the legal citations and argument in the above mentioned  
19 pleading as support for the above claim.

20 ATTACHMENTS

21 As previously stated, through the Order issued by the  
22 Court on June 5, 2006, Petitioner was granted leave to attach  
23 to this amended/supplemental petition certain documents.

24 Accordingly, the following have been attached;

25 1. "The Board's written statement recommending that parole be  
26 granted."

27 Attached as Exhibit A to this amended/supplemental  
28 petition is BPT Form 1001, generated and signed at the

1 September 24, 2004 hearing, a copy of which was obtained by  
2 Petitioner from his Central File, which is kept at Correctional  
3 Training Facility-Soledad, where he is incarcerated.

4 2. "Forms and documents generated and utilized by the Board in  
5 connection with Petitioner's (Sept. 24, 2004) hearing."

6 Petitioner and his counsel made attempts to obtain  
7 documents relevant to the above mentioned materials,  
8 specifically the BPT 1000(b) [Setting a Term-Life Prisoner  
9 Parole-Granted] form that was generated as a result of  
10 Petitioner's 9/24/2004 hearing. an informal request made by  
11 Petitioner's counsel that any such "forms and documents" be  
12 provided, pursuant to the Court's 6/5/2006 Order was made on or  
13 around June 23, 2006. Counsel for the Respondents replied by  
14 a two-page letter, dated June 28, 2006, which has been attached  
15 to this amended/supplemental petition as Exhibit B.

16 The Petitioner himself also made efforts to obtain such  
17 forms and documents through the prison where he is  
18 incarcerated. A declaration by Petitioner, [which includes its  
19 own exhibits, numbered 1-4], has been attached to this  
20 amended/supplemental petition as Exhibit C.

21 Based on the above, Petitioner request that the Court  
22 order Respondent to produce for review by both the Petitioner  
23 and the Court the BPT 1000(b) form referenced above and any  
24 other "forms and documents" that might be attached by  
25 Petitioner in response to the Court's 6/5/2006 Order.

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27 properly authenticates and identifies the documents to which he  
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1 A declaration from Mr. Freddy Fikes, [with it's own  
2 exhibits, labeled, by Declarant, Appendix B(2)(3) and (4)] has  
3 been attached to this amended/supplemental petition Exhibit D.  
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5 Dated: July 10, 2006

Respectfully Submitted,

6 Michael Herro

7 Michael Herro, Attorney for Petitioner  
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Exhibit N.

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MONTEREY

In re

Fred L. Baker (C-22918)

On Habeas Corpus.

) Case No.: HC 4990

) ORDER

Petitioner brought a writ of habeas corpus in which he contends that The Board of Prison Terms violated his right to Due Process by rescinding its September 24, 2004 parole suitability finding. The reason for the Board's rescission was that a portion of the parole suitability hearing was not transcribed. Only a partial transcript could be obtained either because the tape recorder malfunctioned or because the Board only provided one of two hearing tapes for transcription. Petitioner argues that he should not be punished for the Board's failure to operate its recording equipment or failure to ensure that all hearing tapes were submitted for transcription.

Subsequent to the filing of the writ, the Board conducted a *de novo* hearing before the original hearing panel. The panel then reversed its previous finding of suitability. Petitioner now avers that a proper record could have been made without conducting a *de novo* hearing. This claim was neither expressly nor implicitly raised in the habeas petition, as it was entirely unknown at the time the writ was filed what process would be undertaken by the Board to remedy the Board's error.

The Court issued an Order to Show Cause, noting that Penal Code section 3042(b)<sup>1</sup> places the duty on the Board, not the inmate, to record and transcribe parole suitability

<sup>1</sup> Unless otherwise indicated, all further statutory references are to the Penal Code.

1 hearings. The Court ordered Respondent to show cause why any rescheduled hearing should  
2 not be before the same Board members with instructions to issue a Decision recommending  
3 parole, and to address the apparent inequity created by Respondent's interpretation of the law.  
4 In the Court's view, the most equitable solution involved (1) the adoption by panel members of  
5 the existing transcript and the documents created or relied upon by the Board at the hearing,  
6 and (2) a recreation of the panel's Decision based upon the transcript and documents, together  
7 with the independent recollections of panel members.

8 Respondent defended the Board's actions as proper, arguing that Sections 3041(b),  
9 3041.1, and 3042(b)-(c) require that all portions of a suitability hearing be transcribed to ensure  
10 that the Governor is not deprived of his statutory right to review a grant of parole. In this,  
11 Respondent errs. The sections cited by Respondent merely provide a process for the review of  
12 a parole hearing decision. No mandate is set forth requiring a rehearing where, as here, the  
13 recording equipment malfunctions or staff simply neglects to produce all tapes for  
14 transcription. A hearing record is sufficient for purposes of review whether it be made by  
15 transcript or *written summary*. "A record (a verbatim transcript, tape recording or written  
16 summary) shall be made of all hearings. The record of hearing shall include *or incorporate by*  
17 *reference* the evidence considered, the evidence relied on, and the findings of the hearing panel  
18 with supporting reasons." 15 CCR sec. 2254 (emphasis added).

19 Respondent failed to analyze or discuss the relevant equities of the matter, asserting that  
20 "the court improperly directed Respondent to justify holding a rehearing rather than having the  
21 panel recreate its decision . . . ." It is the function of the court to discover the truth of factual  
22 allegations set forth by a petitioner, and to provide justice by fashioning a remedy where the  
23 petitioner has stated a *prima facie* case. *Board of Prison Terms v. Superior Court* (2005) 130  
24 Cal.App.4<sup>th</sup> 1212. A court is not constrained in its crafting of an appropriate remedy simply  
25 because an action has been inartfully pled. Nevertheless, a court's power under Section 1484

1 "to do and perform all other acts and things necessary to a full and fair hearing and  
2 determination of the case" is limited. Pen. Code sec. 1484. "The superior court's power under  
3 section 1484 does not authorize the court to consider new claims not expressly or implicitly  
4 raised in the original habeas petition or supported by the factual allegations in the original  
5 habeas petition unless those claims have been asserted in a supplemental habeas petition filed  
6 with the permission of the court." *Id.*, at pp. 1238-39 (emphasis added).

7 Petitioner filed his Traverse/Response, a motion to amend the Traverse/Response, and a  
8 Request for Judicial Notice. Respondent filed an opposition and objection, and Petitioner filed  
9 his response thereto. Petitioner asserts that the Decision granting parole was in accordance  
10 with the law, even if the hearing transcript is incomplete. Petitioner maintains that he, the  
11 victim and others were given an opportunity to be heard, and that "a written statement setting  
12 forth the recommendation of parole was generated, as were documents regarding the condition  
13 of release and consequences for failure to meet those conditions." The Court notes that the  
14 California Department of Corrections and Rehabilitation (CDCR) generates specific forms  
15 utilized by the Board during parole consideration hearings, including BPT Form 1000(a) [Life  
16 Prisoner Parole Consideration Worksheet], Form 1000(b) [Setting a Term-Life Prisoner Parole  
17 Granted], and Form 1005 [Life Prisoner: Parole Consideration Proposed Decision]. DOM sec.  
18 74040.5.3 ("Required BPT Forms (Life Cases)"). It is mandated that the forms be prepared  
19 prior to the hearing and utilized during the hearing. DOM secs. 74040.5.3, 74040.5.4.

20 Petitioner requests that the Court take judicial notice of blank BPT worksheets (BPT  
21 Forms 1000(a)-(b) used by Board members during the hearings to justify their decision to grant  
22 or deny parole. Judicial notice may be taken of facts and propositions which are not reasonably  
23 subject to dispute and are subject to immediate and accurate determination through sources of  
24 reasonably undisputable accuracy. Evid. Code sec. 452(h). A court must take judicial notice  
25 of such matters if the requesting party provides sufficient notice to the adverse party, and

1 furnishes the court with sufficient information to comply with the party's request. Evid. Code  
2 sec. 453. Here, the forms subject to the request are promulgated and utilized by Respondent,  
3 and appear to be blank copies of documents which the Board was required to utilize during  
4 Petitioner's initial hearing. DOM secs. 74040.5.3, 74040.5.4. The documents bear BPT Form  
5 numbers 1000(a) and 1000(b), respectively. Respondent does not dispute the existence or  
6 accuracy of these forms. Accordingly, the Court takes judicial notice of the blank BPT Forms  
7 1000(a)-(b) as Parole consideration worksheets utilized by the Board in considering an  
8 inmate's suitability for parole.

9 Petitioner further requests that the Court judicially notice a document entitled "Review  
10 of Proposed Decision," BPT Form 1138. The document appears to embody an administrative  
11 act of the Board, and is executed by Chief Counsel David E. Brown and Chief Deputy  
12 Commissioner James B. Dowling. Administrative acts are subject to judicial notice. Evid.  
13 Code sec. 452(c). The Court has reviewed a declaration appended to the document, in which  
14 the declarant identifies the document and the purpose for which it was created. The declarant  
15 states that a portion of his hearing transcript was unrecorded due to an alleged problem with the  
16 recording equipment. There, the Board did not conduct a new hearing but instead utilized the  
17 decision worksheet "to complete the process." Declarant attempts to incorporate by reference  
18 the Review of Proposed Decision into his declaration. The document indicates that in  
19 Declarant's case, the recommendations by the Decision Review Unit to (1) append an errata  
20 sheet to the transcript which set forth the information on the Life Prisoner Parole Consideration  
21 Worksheet, and (2) check the box on the title page of the transcript indicating that an errata  
22 sheet was prepared, were approved by the Board. Judicial notice of the authenticity and  
23 contents of an official document does not serve to establish the truth of all the recitals therein,  
24 nor render admissible those matters which are inadmissible. 1 Wilkin, Cal. Evid. (4<sup>th</sup> ed.) sec.  
25 19; Evid. Code sec. 452(c). Accordingly, the Court takes judicial notice of the Board's official

1 act in utilizing Form 1138 in its determination of Declarant's parole suitability, but not the  
2 veracity of the facts alleged therein.

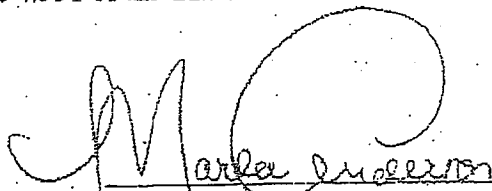
3 The Traverse/Response further sets forth Petitioner's claim that the Board lacked  
4 jurisdiction to preside over his parole suitability hearing given the time constraints of Sections  
5 3041(b), 2041, 2042 and 2451. The Court takes no position as to the merits of this claim, as it  
6 was neither raised in the original petition nor supported by the factual allegations contained  
7 therein. *Board of Prison Terms v. Superior Court, supra*, 130 Cal.App.4<sup>th</sup> at 1238-39.  
8 Nevertheless, where the "superior court determines that the habeas petition has pleading  
9 defects and believes that a correction of the defects is necessary to ensure a full and fair  
10 hearings and a determination of the case, the superior court has the discretion to give notice of  
11 the defect and grant leave to amend or supplement the petition." *Id.*, at 1239 (citing *People v.*  
12 *Handcock* (1983) 145 Cal.App.3d Supp. 25, 32-33).

13 The Court finds that the instant petition contains pleading defects which must be  
14 corrected in order to ensure that Petitioner receives a fair and complete determination of his  
15 claims. The underlying petition solely challenged the fact of the Board's rescission of its  
16 suitability finding. Subsequent to the discovery of new facts during the course of discovery,  
17 Petitioner developed additional theories of relief, which addressed, *inter alia*, the process  
18 involved in the rescission. In the interests of justice and as contemplated by Section 1484, the  
19 Court now grants Petitioner leave to amend or supplement his petition by addressing those facts  
20 and theories relevant to the Board's rescission which were not expressly or implicitly raised in  
21 the petition, as set forth hereinabove. Petitioner is invited to attach to the amended or  
22 supplemental petition the following: (1) the Board's written statement recommending that  
23 parole be granted; (2) forms and documents generated and utilized by the Board in connection  
24 with Petitioner's hearing; and (3) a further declaration in which Declarant properly  
25 authenticates and identifies the documents to which he refers. Petitioner shall have 30 days

1 from the date of this Order in which to file his amended or supplemental petition; all other  
2 filing timelines shall be in accordance with Rule 4.551 of the California Rules of Court.

3 IT IS SO ORDERED.

4 Dated:

  
Hon. Marla O. Anderson  
Judge of the Superior Court



1 Michael Herro, Attorney at Law  
SBN: 233749  
2 Law Office of Michael Herro  
134 Central Ave.  
3 Salinas, California 93901  
4 Phone and fax (831) 753-0992  
5 Attorney for Petitioner Fred L. Baker

**FILED**

JUL 10 2006

LISA M. GALDOS  
CLERK OF THE SUPERIOR COURT  
K. H. Hanson DEPUTY

6 SUPERIOR COURT OF MONTEREY COUNTY  
7  
8 IN AND FOR THE STATE OF CALIFORNIA  
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IN RE  
FRED L. BAKER  
ON HABEAS CORPUS

HC 04990

AMENDED/SUPPLEMENTAL

PETITION AND ATTACHMENTS

Dept. 9- Judge Anderson

On June 5, 2006 an Order was issued by this Court granting leave to Petitioner to file a supplement or amendment to his original petition by addressing certain facts that in the Court's view had not been raised expressly or implicitly in the original petition and pleadings filed in this matter. The Order stated any supplement or amendment be filed within 30 days of issuing the Order. It was mailed to counsel for Petitioner. The Order was received on or about June 8, 2005. Based on receiving service by mail, under C.C.P. 1013, this amended/supplemental petition was to be filed within 35 days

1 from the date the Order issued.

2 Specifically, the Court gave Petitioner leave to address  
3 whether the Board of Prison Terms lost jurisdiction to preside  
4 over parole suitability hearings held subsequent to the  
5 challenged September 24, 2004 hearing, pursuant to Penal Code  
6 sections 3041(b), 2041, 2042 and 2451. Further, the Court  
7 invited Petitioner to attach the following to any supplement or  
8 amendment to the petition; 1.) the Board's written statement  
9 recommending that parole be granted, 2.) forms and documents  
10 generated and used by the Board in connection with Petitioner's  
11 hearing, and 3.) a further declaration in which Declarant  
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14 Freddy Fikes, another inmate who was involved in a situation  
15 where a portion of his parole suitability hearing was not tape  
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17 Board could rely on certain documents produced as part of the  
18 hearing in making their decision whether to grant or deny  
19 parole.

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21 AMENDMENT OF ORIGINAL PETITION TO INCLUDE CLAIM THAT BOARD LOST  
22 JURISDICTION TO PRESIDE OVER "REHEARING" OF THE PAROLE  
23 SUITABILITY HEARING CONDUCTED ON SEPTEMBER 24, 2004 BECAUSE OF  
24 TIME LIMITS SET BY PENAL CODE SECTION 3041(B) AND CALIFORNIA  
25 CODE OF REGULATIONS, TITLE 15, DIVISION TWO, SECTIONS 2041,  
26 2042, 2044 AND 2451.

27 Petitioner hereby request that the above claim be amended  
28 to and included as part of original petition for Habeas Corpus

1 filed in this matter on Jan. 27, 2005, as an additional ground  
2 on which to base the Petitioner's claim for relief.

3 Petitioner was found suitable for parole following a full  
4 hearing conducted on September 24, 2004. On November 30, 2006  
5 the Decision Review Unit recommended that the 9/24/2004  
6 decision be disapproved and that a rehearing be conducted on  
7 the matter on the next available calender. Then, on December  
8 14, 2004, the Board of Prison Terms voted disapprove of the  
9 proposed decision to grant parole.

10 These actions were taken despite the time limits  
11 delineated in 15 CCR 2041, and the other sections cited above,  
12 and therefore were taken at a time when both the Decision  
13 Review Unit and the Board of Prison Terms had lost jurisdiction  
14 over the matter. The Traverse filed in this matter fully  
15 addresses the statutory time limits referred to above,  
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17 reference. Petitioner respectfully request the Court consider  
18 the legal citations and argument in the above mentioned  
19 pleading as support for the above claim.

20 ATTACHMENTS

21 As previously stated, through the Order issued by the  
22 Court on June 5, 2006, Petitioner was granted leave to attach  
23 to this amended/supplemental petition certain documents.

24 Accordingly, the following have been attached;

25 1. "The Board's written statement recommending that parole be  
26 granted."

27 Attached as Exhibit A to this amended/supplemental  
28 petition is BPT Form 1001, generated and signed at the

1 September 24, 2004 hearing, a copy of which was obtained by  
2 Petitioner from his Central File, which is kept at Correctional  
3 Training Facility-Soledad, where he is incarcerated.

4 2. "Forms and documents generated and utilized by the Board in  
5 connection with Petitioner's (Sept. 24, 2004) hearing."

6 Petitioner and his counsel made attempts to obtain  
7 documents relevant to the above mentioned materials;  
8 specifically the BPT 1000(b) [Setting a Term-Life Prisoner  
9 Parole Granted] form that was generated as a result of  
10 Petitioner's 9/24/2004 hearing. an informal request made by  
11 Petitioner's counsel that any such "forms and documents" be  
12 provided, pursuant to the Court's 6/5/2006 Order was made on or  
13 around June 23, 2006. Counsel for the Respondents replied by  
14 a two-page letter, dated June 28, 2006, which has been attached  
15 to this amended/supplemental petition as Exhibit B.

16 The Petitioner himself also made efforts to obtain such  
17 forms and documents through the prison where he is  
18 incarcerated. A declaration by Petitioner, [which includes its  
19 own exhibits, numbered 1-4], has been attached to this  
20 amended/supplemental petition as Exhibit C.

21 Based on the above, Petitioner request that the Court  
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23 and the Court the BPT 1000(b) form referenced above and any  
24 other "forms and documents" that might be attached by  
25 Petitioner in response to the Court's 6/5/2006 Order.

26 3. "A further declaration in which Declarant (Freddy Fikes)  
27 properly authenticates and identifies the documents to which he  
28 refers."

1 A declaration from Mr. Freddy Fikes, [with it's own  
2 exhibits, labeled, by Declarant, Appendix B(2)(3) and (4)] has  
3 been attached to this amended/supplemental petition Exhibit D.

4  
5 Dated: July 10, 2006

Respectfully Submitted,

6 Michael Herro

7 Michael Herro, Attorney for Petitioner  
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# EXHIBIT A

☒ PAROLE GRANTED - (YES) *Do not release until review*  
CDC: Do not release prisoner before  
Governor's review

☐ PAROLE DENIED - (NO)

Records Use Only

Parole Release Date

YR MO DAY

Attach Prison Calculation Sheet

☐ AGREED UNSUITABLE (Attach 1001A Form) FOR: \_\_\_\_\_ YEAR(S)

☐ HEARING POSTPONED/REASON: \_\_\_\_\_

**PANEL RECOMMENDATIONS AND REQUESTS**

**The Board Recommends:**

- ☐ No more 115's or 128A's ☒ Stay discipline free  
☐ Work to reduce custody level ☐ Learn a trade\* ☒ Earn positive chronos  
☒ Get self-help\* *Continue* ☐ Get therapy\* ☐ Get a GED\*

☐ Recommend transfer to \_\_\_\_\_

☐ Other \_\_\_\_\_

\*These programs are recommended if they are offered at your prison and you are eligible/able to participate.

Penal Code 3042 Notices

☒ Sent Date: 8/6/04

Commitment Offense(s)

P209 W/12022.5

KIDNAP FOR ROBBERY W/USE F'ARM

Code(s)

Crime(s)

CR17643

6

Case #(s)

Count #(s)

Date Inmate Came to CDC  
11/6/80

Date Life Term Began

Minimum Eligible Parole Date  
7/31/94

☐ Initial Hearing

☒ Subsequent (Hearing No.) 7

Date of Last Hearing

CDC Representative

Attorney for Prisoner

Address

D.A. Representative

County

This form and the Board's decision at the end of the hearing is only proposed and NOT FINAL. It will not become final until it is reviewed.

Chair *Susan Fisher*

Date

Panel Member *Alendina*

Date

Panel Member *Alendina*

Date

NAME BAKER, FRED

CDC # C22918

PRISON CTF

CALENDAR 9/04

DATE

# EXHIBIT B

**BILL LOCKYER**  
Attorney General

State of California  
DEPARTMENT OF JUSTICE



455 GOLDEN GATE AVENUE, SUITE 11000  
SAN FRANCISCO, CA 94102-7004

Public: (415) 703-5500  
Telephone: (415) 703-5531  
Facsimile: (415) 703-5843  
E-Mail: [Denise.Yates@doj.ca.gov](mailto:Denise.Yates@doj.ca.gov)

June 28, 2006

**VIA FACSIMILE**

Michael Herro, Attorney at Law  
Law Office of Michael Herro  
134 Central Ave.  
Salinas, CA 93901  
Fax: (831) 753-0992

RE: In re Fred L. Baker (C-22918), On Habeas Corpus  
Superior Court of California, County of Monterey, Case No. HC 4990

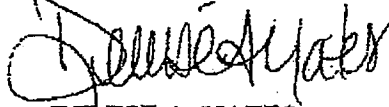
Dear Mr. Herro:

I am writing in response to your telephone message of June 26, 2006, in which you informally requested some Board documents. You requested a copy of the BPT form 1000(b) from Baker's September 24, 2004 hearing. You also requested a copy of the other documents referenced in the court's June 5, 2006 Order. The BPT form 1000(b) is a worksheet that the commissioners use as a guide in announcing their decision. The worksheet is not meant to be placed in the central file nor is it regularly maintained by the Board. The court's statement that the BPT forms 1000(a) and (b) are prepared before the hearing and utilized by the Board during the hearing reflects a misunderstanding of the Department Operations Manual. The BPT forms 1000(a) and (b) are the forms used when the Board denies or grants a life prisoner parole, respectively. (Dep't Operations Manual, § 74040.5.3.) Obviously, the Board does not prepare these forms before the hearing because it does not yet know if it will deny or grant the prisoner parole. Rather, the case records staff simply makes these forms available to the commissioners for use at the hearing, if necessary. (See *id.*, § 74040.5.4.)

Mr. Michael Herro  
June 28, 2006  
Page 2

Regarding your second request, I am unable and unwilling to respond to it. If you are referring to the court's comment that you should amend or supplement the petition with "forms and documents generated and utilized by the Board in connection with Petitioner's hearing," your request is ambiguous. I do not know the total documents you or the court are referring to. Until you can specify which documents you are requesting and confirm that they are not in your client's central file, I cannot provide a better response. Thank you for your consideration.

Sincerely,

A handwritten signature in dark ink, appearing to read "Denise A. Yates", written over a horizontal line.

DENISE A. YATES  
Deputy Attorney General

For BILL LOCKYER  
Attorney General

EXHIBIT C

1 Michael Herro, Attorney at Law  
SBN: 233749  
2 Law Office of Michael Herro  
134 Central Ave.  
3 Salinas, California 93901  
4 Phone and fax (831) 752-0992  
5 Attorney for Petitioner

6 SUPERIOR COURT OF CALIFORNIA  
7 COUNTY OF MONTEREY  
8  
9  
10

11 In re

HC 04990

12 FRED BAKER,

DECLARATION OF FRED BAKER (C-22918)

13 On Habeas Corpus.  
14  
15

16 I, FRED BAKER, hereby declare that if called as a witness, I would  
17 competently testify as follows:

18 1. I am a resident of the state of California, County of  
19 Monterey and the Petitioner in this matter.

20 2. On June 8, 2006, I received a copy of the Court's order  
21 granting me leave to amend or supplement my petition, and attach  
22 thereto: 1) the Board's written statement recommending parole be  
23 granted; 2) forms and documents generated and utilized by the Board  
24 in connection with my September 2004 hearing; and 3) a further  
25 declaration in which Declarant (Freddy Fikes) properly authenticates  
26 and identifies the documents to which refers. See (Decl-Ex. 1.)

27 3. On June 9, 2006, at approximately 9:30 a.m., I contacted  
28 Correctional Counselor (CCI) Williams, via institutional phone and

1 and requested a copy of the information specified by the Court.  
2 Specifically, the worksheet utilized by the Board bearing BPT form  
3 number 1000(b)[Setting a Term-Life Prisoner Parole Grant], as well  
4 as all forms and documents generated and utilized by the Board in  
5 connection with the September 2004 hearing. CCI Williams instructed  
6 me to submit a Multi-Purpose Form (CTF-304), listing the documents  
7 I needed. Upon conclusion of the call I submitted the form. See  
8 (Decl-Ex. 2.) However, due to conflicting work hours and the hours  
9 in which I can access the law library, I was unable to attach a copy  
10 of the Court order with the request.

11 4. Accordingly, on June 11, 2006, I obtained copies of the  
12 Court Order.

13 5. On June 13, 2006, I submitted a subsequent Multi-Purpose  
14 Form to CCI Williams, attached thereto a copy of the Order. See  
15 (Decl-Ex. 3.)

16 6. On June 16, 2006, CCI Williams called me to the housing  
17 unit office for an "Olsen's Review" to review my Central File. Upon  
18 reviewing the file, in the presences of CCI Williams, I noted the  
19 BPT 1000(b) form was not part of the file. I then asked CCI Williams  
20 was he able to locate the documents requested per the Court order, at  
21 which point he stated that he had sent copies of everything he could  
22 find in connection with the September 24, 2004 hearing. A copy of  
23 those documents are attached to this declaration as declarant's exhibit  
24 number four. See (Decl-Ex. 4.)

25 7. After further inquiring about the requested material, I was  
26 told to "have your attorney call me at my number here at the  
27 institution ext. # 4347, and I [Williams] will let him know that those  
28 documents are not part of the C-file.")

1 I declare under penalty of perjury under the laws of the State  
2 of California that the foregoing is true and correct. My expressions  
3 of belief as to each specified fact are based on the reasons I have  
4 given as to each such fact. I am willing to testify to the same in  
5 a court of law. I so swear, this 18 day of June, 2006, at Soledad,  
6 California.

7  \*

8 Fred Baker  
9 Declarant  
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**DECL.-EXHIBIT 1**

Michael Herro

Attorney at Law

134 Central Avenue

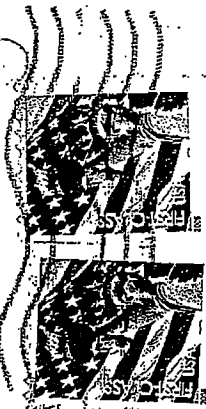
Salinas, Ca 93901

LEGAL MAIL

LEGAL AND CONFIDENTIAL

SAN JOSE CA 951

06 JUN 2006 PM 6 L



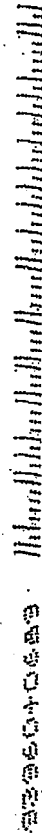
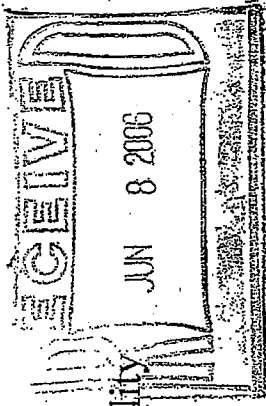
Mr. Fred L. Baker

C-22918, B-321

Correctional Training Facility

P.O. Box 689

Soledad, Ca. 93960-0689





LISA M. GALDOS  
Court Executive Officer  
and Jury Commissioner

SUPERIOR COURT OF CALIFORNIA  
COUNTY OF MONTEREY

**Fax**

Salinas Division  
240 Church St., Suite 318  
Salinas, CA 93901  
(831) 775-5400

Monterey Division  
1300 Aquajito Road  
Monterey, CA 93940  
(831) 647-5800

Marina Division  
3180 Del Monte Blvd  
Marina, CA 93933  
(831) 883-2300

King City Division  
250 Franciscan Way  
King City, CA 93930  
(831) 386-5200

<http://www.co.monterey.ca.us/court/>

**TO:** Michael Herro

**FAX NO.:** 753-0992

**FROM:** Heidi Whilden

**DATE:** June 5, 2006

**NUMBER OF PAGES IN THIS FAX:** 7 (including cover)

The information contained in this facsimile transmission may be confidential, and may be legally protected attorney work-product, or may be inside information. This information is intended only for the use of the recipient(s) named below. If you have received this information in error, please immediately notify us by telephone to arrange for return of all documents. Any unauthorized disclosure, distribution, or taking of any action in reliance on the contents of this information is strictly prohibited and may be unlawful.

**COMMENTS:**

Attached is a courtesy copy of the Judge's ruling in the Baker matter. It is undated and will bear the date on which it is filed by the habeas clerk. I will request that the clerk file and process the order today.

THE MISSION OF THE COURT IS TO DISPENSE JUSTICE IN ALL MATTERS WITHIN  
ITS JURISDICTION IN AN IMPARTIAL MANNER AND IN ACCORDANCE WITH THE LAW

**DECL.-EXHIBIT 2**

## MULTI-PURPOSE FORM

TO: Williams  
(Name)CCI  
(Title)DATE: 6/9/06

- ☐ MEDICAL CONCERN  
☐ DENTAL CONCERN  
☐ VISITING CONCERN  
☐ REQUEST FOR INTERVIEW  
☐ PACKAGE ROOM  
☐ REQUEST FOR I.D. CARD  
☐ REQUEST TO REVIEW CENTRAL FILE  
☐ MAIL ROOM: Request for metered envelopes (No Funds)  
☐ E.P.R.D.: You should be within six (6) months of release date to inquire
- ☐ TRUST ACCOUNT BALANCE \$ \_\_\_\_\_  
☐ TRUST ACCOUNT WITHDRAWAL  
☐ REQUEST FOR ROOM CHANGE  
☐ REQUEST FOR UNIT CHANGE  
☐ FAMILY HOUSING UNIT VISIT INTERVIEW  
☐ REQUEST FOR CHAPLAIN INTERVIEW  
☐ MEDICALLY CLEARED FOR CULINARY REQUEST

REASON FOR REQUEST (Be specific: Explain your problem): I need a copy of the following documents from my C-file pertaining to my September 24, 2004 parole hearing. This request is made pursuant to the Monterey Superior's Court order of June 2, 2006. The Board's written statement recommends

DATE: \_\_\_\_\_ STAFF RESPONSE: \_\_\_\_\_

INMATE NAME: Baker, F. INMATE NUMBER: C 22918 CELL: B-321  
ASSIGNMENT: CLOTHING HOURS: 0630 HRS - 1430 HRS RDO'S: S/S/H.

CTF-304 (Rev. 04-9)

B321L  
See Reverse Side

that parole be granted; 2) BPT-1000(b) worksheet; 3) BPT-1138(a) Review of Proposed Decision; and 4) all forms and documents generated and utilized by the Board in connection with the Sept. 2004 hearing.

Your assistance in this matter  
is greatly needed and appreciated.

Respectfully, F Baker

Thank you

**DECL.-EXHIBIT 3**

## MULTI-PURPOSE FORM

TO: Williams CCI DATE: 6/13/2006  
 (Name) (Title)

- |   |   |
|---|---|
| <input type="checkbox"/> MEDICAL CONCERN  | <input type="checkbox"/> TRUST ACCOUNT BALANCE \$ _____         |
| <input type="checkbox"/> DENTAL CONCERN   | <input type="checkbox"/> TRUST ACCOUNT WITHDRAWAL               |
| <input type="checkbox"/> VISITING CONCERN   | <input type="checkbox"/> REQUEST FOR ROOM CHANGE                |
| <input type="checkbox"/> REQUEST FOR INTERVIEW  | <input type="checkbox"/> REQUEST FOR UNIT CHANGE                |
| <input type="checkbox"/> PACKAGE ROOM   | <input type="checkbox"/> FAMILY HOUSING UNIT VISIT INTERVIEW    |
| <input type="checkbox"/> REQUEST FOR I.D. CARD  | <input type="checkbox"/> REQUEST FOR CHAPLAIN INTERVIEW         |
| <input type="checkbox"/> REQUEST TO REVIEW CENTRAL FILE   | <input type="checkbox"/> MEDICALLY CLEARED FOR CULINARY REQUEST |
| <input type="checkbox"/> MAIL ROOM: - Request for metered envelopes <i>(No Funds)</i>             | (Please see reverse side)                                       |
| <input type="checkbox"/> E.P.R.D.: You should be within six (6) months of release date to inquire |   |

REASON FOR REQUEST (Be specific: Explain your problem): On June 9, 2006, I contacted you concerning a recei  
Court order (HC 04990) I received requiring a copy of specific documents from my C-file in  
connection with my September 24, 2004, parole hearing. You advised me to submit a multi-purpo  
form, which I did, listing the items. However, due to a lack of access to a copier at that ti

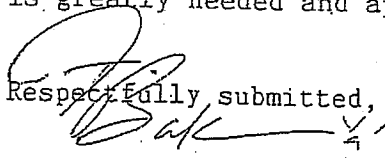
DATE: \_\_\_\_\_ STAFF RESPONSE: \_\_\_\_\_

INMATE NAME: Baker, F. INMATE NUMBER: C-22918 CELL: B-321L  
 ASSIGNMENT: Clothing Room HOURS: 0630 Hrs - 1430 Hrs. RDO'S: S/S/H

(con't)

I was unable to attach a copy of the Court order. A copy of that Order is attached to this multi-purpose form. Please see page 4, lines 2-6, and 5, lines 22-24. The documents are needed asap due to time restraints. Your assistance in this matter is greatly needed and appreciated.

Respectfully submitted,

  
F. Baker C-22918

**DECL.-EXHIBIT 4**

Board of Prison Terms

State of California

**MISCELLANEOUS DECISION****FACTS**

During the December 14, 2004 Executive Meeting of the Board of Prison Terms, the Board, sitting en banc, considered the findings of the Decision Review Unit regarding the proposed decision dated September 24, 2004, for life prisoner Fred Baker, C-22918. Following consideration, the full Board voted to disapprove the proposed decision of September 24, 2004; and schedule a rehearing of the prisoner's seventh subsequent parole consideration hearing on the next available calendar.

**DECISION(S)**

Disapprove the September 24, 2004 proposed decision and schedule a rehearing of the prisoner's seventh subsequent parole consideration hearing on the next available calendar.

STAFF (Name)

TITLE

DATE

MARVIN E. SPEED II

Executive Officer

12-20-04

NAME

NUMBER

INSTITUTION

BAKER, Fred

C-22918

CTF

Board of Prison Terms

State of California


**MISCELLANEOUS DECISION**

**FACTS**

During the December 14, 2004 Executive Meeting of the Board of Prison Terms, the Board, sitting en banc, considered the findings of the Decision Review Unit regarding the proposed decision dated September 24, 2004, for life prisoner Fred Baker, C-22918. Following consideration, the full Board voted to disapprove the proposed decision of September 24, 2004, and schedule a rehearing of the prisoner's seventh subsequent parole consideration hearing on the next available calendar.

**DECISION(S)**

Disapprove the September 24, 2004 proposed decision and schedule a rehearing of the prisoner's seventh subsequent parole consideration hearing on the next available calendar.

STAFF (Name)	TITLE	DATE
 MARVIN E. SPEED II	Executive Officer	12-20-04

NAME	NUMBER	INSTITUTION
BAKER, Fred	C-22918	CTF

**LIFE PRISONER PAROLE CONSIDERATION WORKSHEET**

☐ INITIAL HEARING ☒ SUBSEQUENT HEARING

PRISONER'S NAME Baker CDC NUMBER C22918  
 DATE OF HEARING \_\_\_\_\_ LOCATION CTF

**LEGAL STATUS**

DATE RECEIVED 11-6-80 DATE LIFE TERM STARTS (IF DIFFERENT) \_\_\_\_\_ COUNTY Riverside  
 OFFENSE Kidnap for Robbery w/ use of arm CASE NUMBER CR17643  
 COUNT NUMBER(S) 06 PENAL CODE SECTION(S) VIOLATED P209 w/ P2022.5  
 TERMS 17 to Life MEPD 7-31-94

**OTHER COMMITMENT OFFENSES OR STAYED COUNTS**

STAYED	OFFENSE	CODE SECTION	COUNTY	CASE NUMBER	COUNT NUMBER
<input type="checkbox"/>	_____	_____	_____	_____	_____
<input type="checkbox"/>	_____	_____	_____	_____	_____
<input type="checkbox"/>	_____	_____	_____	_____	_____

**PRESENT AT HEARING**

PANEL MEMBER _____	PANEL MEMBER _____	PANEL MEMBER _____
--------------------	--------------------	--------------------

**OTHERS PRESENT**

☐ PRISONER (IF ABSENT, WHY?) \_\_\_\_\_  
☐ ATTORNEY \_\_\_\_\_  
☐ DEPUTY D.A. \_\_\_\_\_ COUNTY OF \_\_\_\_\_  
☐ OTHERS: \_\_\_\_\_

**STATEMENT OF FACTS**

☐ THE HEARING PANEL INCORPORATES BY REFERENCE FROM THE DECISION OF THE HEARING HELD

ON \_\_\_\_\_, PAGES \_\_\_\_\_ THROUGH \_\_\_\_\_

**THE STATEMENT OF FACT IS**

☐ QUOTED FROM THE BOARD REPORT, DATED \_\_\_\_\_, PAGE(S) \_\_\_\_\_  
☐ QUOTED FROM THE PROBATION OFFICER'S REPORT, PAGE(S) \_\_\_\_\_  
☐ QUOTED FROM THE COURT OPINION, PAGE(S) \_\_\_\_\_

☒ PAROLE GRANTED - (YES) *Do not release until review*  
CDC: Do not release prisoner before  
Governor's review

☐ PAROLE DENIED - (NO)

Records Use Only

Parole Release Date

YR MO DAY

Attach Prison Calculation Sheet

☐ AGREED UNSUITABLE (Attach 1001A Form) FOR: \_\_\_\_\_ YEAR(S)

☐ HEARING POSTPONED/REASON: \_\_\_\_\_

**PANEL RECOMMENDATIONS AND REQUESTS**

**The Board Recommends:**

☐ No more 115's or 128A's

☒ Stay discipline free

☐ Work to reduce custody level

☐ Learn a trade\*

☒ Earn positive chronos

☒ Get self-help\* *Continue*

☐ Get therapy\*

☐ Get a GED\*

☐ Recommend transfer to \_\_\_\_\_

☐ Other \_\_\_\_\_

\*These programs are recommended if they are offered at your prison and you are eligible/able to participate.

Penal Code 3042 Notices

☒ Sent Date: 8/6/04

Commitment Offense(s)

P209 W/12022.5

KIDNAP FOR ROBBERY W/USE F'ARM

Code(s)

Crime(s)

CR17643

6

Case #(s)

Count #(s)

Date Inmate Came to CDC  
11/6/80

Date Life Term Began

Minimum Eligible Parole Date  
7/31/94

☐ Initial Hearing

☒ Subsequent (Hearing No.) 7

Date of Last Hearing

CDC Representative

Attorney for Prisoner

Address

D.A. Representative

County

This form and the Board's decision at the end of the hearing is only proposed and NOT FINAL. It will not become final until it is reviewed.

Chair *Susan Fisher*

Date

Panel Member *Alendin*

Date

Panel Member *Alendin Rvm*

Date

NAME BAKER, FRED

CDC # C22918

PRISON CTF

CALENDAR 9/04

DATE